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No. _____

In The

Supreme Court of the United States

October Term, 1994

MULTNOMAH COUNTY,

Petitioner,

v.

JAN JOHNSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a public employee's speech, on a matter of public concern, protected by the First Amendment where it is made in reckless disregard of the truth?

2. If recklessly false statements are not per se unprotected, how much disruption to operations must a public employer tolerate before limiting false or disparaging speech?

LIST OF PARTIES

Petitioner (Defendant-Appellee in the Ninth Circuit):

Multnomah County, a political subdivision of the State of Oregon.

Respondent (Plaintiff-Appellant in the Ninth Circuit):

Jan Johnson.

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No. _____

In The

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MULTNOMAH COUNTY,

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v.

JAN JOHNSON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (filed on February 16, 1995), which vacated an Order (dated March 11, 1993) of the United States District Court for the District of Oregon.

OPINIONS BELOW

The Opinion of the Ninth Circuit is reported at 48 F.3d 420, and is reprinted herein as Appendix A.

The Order of the United States District Court for the District of Oregon, adopting the Findings and Recommendation of the United States Magistrate Judge, has not been reported. The United States Magistrate Judge's Findings and Recommendation is reprinted herein as Appendix B.

JURISDICTION

The Opinion and Judgment of the Ninth Circuit were filed on February 16, 1995. This Court has jurisdiction to review the Judgment and Opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Johnson, a public employee, was fired for falsely and recklessly accusing her supervisor of wrongdoing and incompetence, including obtaining his job through undue influence, getting paid too much, using his computer for personal business, awarding public contracts as payback to friends for personal favors, taking kickbacks and engaging in restraint of trade.

Multnomah County (the "County") hired Johnson in 1987 to be administrative assistant to the manager of Expo, the County's multi-purpose public exposition facility. Johnson's duties were to assist in managing Expo operations, and to plan, organize and supervise the annual County Fair, which was held at Expo. She directed Fair vendors and staff and did most of the work in running the Fair. Her job required a close working relationship with the Expo Manager, who delegated his authority to her (ER 61-62, 159).

When the Expo manager resigned in 1988, Johnson applied for the job. Paul Yarborough, director of the County Department in charge of Expo, interviewed the final candidates, including Johnson, but selected Bill McKinley as the new manager. McKinley became Johnson's supervisor.

Johnson felt she was better qualified for the position and resented the selection of McKinley. She was very vocal and expressed her resentment to Fair staff, vendors and other County employees (ER 134). She accused McKinley of being a "figurehead," and told coworkers and Fair vendors that McKinley was part of a "good old boy network" and that he got his job as a result of undue

influence and promises of payback in the future (ER 50, 85, 112-113, 124-125, 136). However, Johnson later admitted she had no evidence to support allegations of undue influence in McKinley's selection (ER 74-78, 112, 126-127).

Johnson's accusations spread all around Expo. She never considered the damage she could cause to Expo operations or McKinley's reputation (ER 96-97). She never told McKinley what she was telling others about him. Jealous of his position, Johnson undermined him with accusations of misconduct, claiming his salary was wrongly inflated, and that he was misusing a County car, although his salary was set by the Chair of the Board of County Commissioners, and Yarborough had properly approved his car use.

Johnson told coworkers and Fair vendors that McKinley awarded County contracts as payback for personal favors, but later admitted she had no evidence of this (ER 103-104, 110, 146-153). Indeed, Johnson admitted her claims were mere surmise (ER 152). Johnson told coworkers and vendors that McKinley was engaged in "restraint of trade," and that he was improperly renting out Expo facilities without charge. However, this practice was entirely proper and within his discretion as Expo Manager (ER 27, 55, 135-136).

Johnson also told coworkers and vendors that McKinley was not turning over to the County all the money it was entitled to from sales of memorabilia by the artists performing at the Fair (ER 5, 125). Specifically, she implied around the Fair that he was responsible for – and was skimming – missing money from Tee-shirt and memorabilia sales from the Latoya Jackson concert, one of the

Fair's principal attractions. She told one co-worker he was "on the take" (ER 158).

However, two audits were performed at Expo during Johnson's tenure, and she was privately interviewed in both (ER 128-130). She did not mention to the auditors her concerns about a Good Old Boy network, restraint of trade, McKinley's supposed mismanagement or allegedly unethical dispositions of government resources, or his alleged kickbacks or paybacks for personal favors. Johnson never investigated the bases for her accusations, even though, as McKinley's administrative assistant, she was in a position to do so. She never took steps to find out if her surmises were true or false (ER 118, 127, 152).

In July, 1991 McKinley learned of Johnson's accusations. In his opinion, Johnson's unfounded charges against him obliterated their close working relationship. He felt her comments also undermined his relationship with his subordinates and the private vendors at Expo (App A-19). McKinley asked Yarborough to do something. Johnson was put on administrative leave.

Yarborough subsequently conducted an investigation to determine whether Johnson should be disciplined for spreading false reports about McKinley. Johnson admitted she had no evidence to support her conclusions or accusations (ER 127). Johnson was terminated by Yarborough. She then filed a complaint in Federal District court, alleging she was terminated for exercising her right of free speech guaranteed by the First Amendment.

The County moved for summary judgment on the grounds that Johnson's "speech" did not involve matters

of public concern, and was not entitled to First Amendment protection. The County argued (1) that Johnson published her statements recklessly for purely personal reasons, without any facts to support her accusations, and (2) her interest in publishing her personal opinion was outweighed by the County's interest in the efficient operation of its agency. The District Court granted summary judgment, holding that Johnson's speech was related solely to her private dispute with McKinley, and did not address matters of public concern. Having found that Johnson's speech did not address matters of public concern, the District Court had no need to address the County's second argument.

On Johnson's appeal, the Ninth Circuit reversed. Surveying the split among the Circuits on whether recklessly false statements are per se unprotected by the First Amendment, the Ninth Circuit sided with the First, Fifth and D.C. Circuits. It concluded that "recklessly false statements are not per se unprotected . . . when they substantially relate to matters of public concern." App. A-13.

The Ninth Circuit held that the District Court erred when it determined Johnson's statements were not of public concern. However, it stated that the County might yet be entitled to summary judgment if it could show Johnson's speech "so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighs the employee's First Amendment rights." App A-16. "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* The Ninth Circuit acknowledged that the

County had shown "that Johnson's statements interfered with the close working relationship between herself and McKinley and undermined McKinley's relationship with co-workers, subordinates and private vendors." App A-19. However, the Ninth Circuit then set a new standard for public employers by requiring that "the County must do more than show mere disruption. Instead, it must show actual injury to its *legitimate* interests." App A-19 (emphasis in original).

REASONS FOR GRANTING THE WRIT

I.

Virtually every public employer which seeks to discipline an employee for recklessly false statements will be affected by the issues presented in this case: Should such statements be considered protected by the First Amendment? If so, what degree of disruption to its operations must the public employer show to justify disciplining an employee for making such statements?

1. The Ninth Circuit's standard for First Amendment protection of recklessly false speech conflicts directly with decisions of the Sixth, Seventh and Tenth Circuits, which hold that knowingly false statements, or those which are false or disparaging, are not protected.

It is undisputed that Johnson had no evidence, and sought no evidence, to support the charges she levelled at McKinley. Her statements that McKinley's salary was wrongly inflated, that he was engaged in "restraint of

trade," that he improperly rented out Expo facilities, that he awarded County contracts as payback for favors, that he was withholding money from the County on sales of memorabilia, that he was "skimming," and that he was "on the take" were either knowingly or recklessly false.

In a footnote in *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), this Court declined to answer the question whether the First Amendment protects a public employee's speech on a matter of public concern when it is made in knowing or reckless disregard of the truth. The Court stated:

> Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.

20 L. Ed. 2d at 821, fn. 6.

The Circuits have filled the gap in jurisprudence left by *Pickering*, but are sharply split on the issue of what protection is to be afforded recklessly false statements. An older line of cases from the First, Fifth and District of Columbia Circuits conclude that the recklessness of the employee's statements is part of the "*Pickering* balancing test"[1] and refuse to apply a rule that recklessly false

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[1] The *Pickering* balancing test as used in this line of cases means that "although the fact that a statement is recklessly false may create a presumption that the employee's interest in uttering it is subordinate to the government's interest in suppressing

statements are per se unprotected. *Brasslett v. Cota*, 761 F.2d 827, 840-841 (1st Cir. 1985); *Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 376 (5th Cir. 1989); *A.P.W.U. v. U.S. Postal Service*, 830 F.2d 294, 305-06 (D.C. Cir. 1989).

In *Brasslett v. Cota*, a town's fire chief was fired for knowingly or recklessly making false statements during a television interview about the lack of dependable fire equipment. The First Circuit reversed the District Court's dismissal of the chief's claim that he was fired in violation of the First Amendment. It held that "[A] finding that [the employee's] statements were malicious is but a factor to be weighed in the balancing of interests." 761 F.2d at 841.[2]

In *Moore v. City of Kilgore*, a firefighter was suspended for making statements to the press after a fire in which one firefighter died and another was injured. The City contended it had a legitimate interest in controlling the flow of information to ensure its accuracy, and that it was therefore justified in disciplining the firefighter because some of his statements were inaccurate. The Fifth Circuit required the City to prove the firefighter's false statements were made with either knowledge of their

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it, the Court has preserved the possibility that such a statement might be protected if it resulted in no actual harm to the employer." *Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir 1985).

[2] The First Circuit adopted the definition of "malicious" set forth in *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968). That standard requires a subjective inquiry into the speaker's state of mind as to whether the speaker made false statements knowing that they were false or "in fact entertained serious doubts as to the truth of his publication." 761 F.2d at 841, 843-844.

falsity or reckless disregard for the truth. Where no showing was made, no weight was accorded the City's "legitimate interest" under the *Pickering* test. 877 F.2d at 376.

Finally, in *A.P.W.U. v. U.S. Postal Service*, a postal worker was terminated for writing a union newsletter article which, although a fabrication, stated he had read a Congressman's anti-union petition he found in third class mail. The government argued that the employee was properly fired for violating a postal regulation and publishing a knowing lie. The D.C. Circuit noted that "intentional falsehoods are among the forms of expression least deserving of first amendment protection." However, it found that the article was a "narrative fiction" deserving considerable First Amendment protection, unlike an intentional false statement, and concluded under the *Pickering* test that it was protected. 830 F.2d 306.

More recent, and better-reasoned cases from the Sixth, Seventh and Tenth Circuits hold that a public employee's false speech is not protected if it is knowingly or recklessly made, despite the fact that it may involve matters of public concern. *Williams v. Com. of Ky.*, 24 F.3d 1526 (6th Cir.), *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 312, 115 S. Ct. 358 (1994); *Brenner v. Brown*, 36 F.3d 18 (7th Cir. 1994); *Powell v. Gallentine*, 992 F.2d 1088 (10th Cir. 1993).

Williams v. Com. of Ky. involved a public employee who claimed she was removed from her job and demoted in retaliation for speech protected by the First Amendment. The Sixth Circuit considered, among other things, whether the employer was qualifiedly immune from liability because the employee's statements were false statements knowingly or recklessly made. The Sixth Circuit stated:

> [F]or purposes of determining if public officials are entitled to qualified immunity, * * * "[i]f an official reasonably believes that an employee made statements with knowledge of, or reckless indifference to, their falsity, the official would conclude that the employee could be fired without offending the First Amendment," and therefore be entitled to qualified immunity. [citations].

24 F.3d at 1535. However, unlike the present case, the Sixth Circuit found nothing in the record from which to infer that a reasonable official could have believed Williams' statements were false statements knowingly or recklessly made. *Id.* at 1536.

The employee in *Brenner v. Brown* was disciplined for disparaging her supervisor by saying she used Gestapo tactics, by describing her variously as a Hitler, a communist, a fascist, and a guard dog and by stating that she needed psychiatric counselling. The Seventh Circuit found that the employee's speech was not protected:

> * * * Moreover, even if the speech * * * involved a matter of public concern, an employee's speech is not protected where it is made with a reckless disregard for the truth, or is otherwise profane and disparaging.

36 F.3d at 20. The Seventh Circuit further held that the employer's discipline was a reasonable response to outrageous and unsupported defamatory remarks. 36 F.3d at 21.

In *Powell v. Gallentine*, a state university professor claimed his discharge for publishing allegations of grade fraud violated the First Amendment. The university

argued that the professor's interest in speaking could not outweigh their interest in the efficient operation of the university because they believed his allegations were false. The Tenth Circuit adopted a bright line test, holding that "[E]ven false allegations are entitled to First Amendment protection, unless they were knowingly or recklessly made." 992 F.2d at 1091.[3] *Williams, Brenner* and *Powell* implicitly reject applying the "Pickering balancing test" to false statements recklessly made.

The Circuits have read the *Pickering* footnote to have widely differing meanings. While the Seventh Circuit in *Brenner v. Brown* found speech that involves a matter of public concern "not protected where it is made with a reckless disregard for the truth or is otherwise profane and disparaging," 36 F.3d at 20, the view of the First Circuit is one hundred eighty degrees to the contrary.

In *Brasslett v. Cota, supra,* the First Circuit found that *Pickering* preserved the possibility that a recklessly false statement "might be protected if it resulted in no actual harm to the employer." 761 F.2d at 840. The Fifth Circuit reached a similar conclusion in *Moore v. City of Kilgore, Tex., supra,* where it read into Footnote 6 a balancing test:

> "Before the City's interest in the accurate dissemination of information may carry *any* weight

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[3] In *Powell v. Gallentine, supra,* the Tenth Circuit made plain that whether the employer believes that the employee's allegations are false is irrelevant. What is crucial is whether the employee made the false allegations knowingly or recklessly, 992 F.2d at 1091. The Tenth Circuit discussed the *Pickering* balancing test, but only after finding that none of the employee's statements were made knowingly or recklessly.

> in the *Pickering/Connick* balance, the City must prove that Moore made false statements of fact with either knowledge of their falsity or with reckless disregard of their truth or falsity."

877 F.2d at 376.

Predictably, this difficult question has been repeatedly raised on appeal, and in petitions for certiorari. The Ninth Circuit has answered it by holding that "recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test." App A-13. In this Court's silence, other Circuits have fashioned conflicting protections, ranging from the Sixth, Seventh and Tenth Circuits' rule that recklessly false statements are per se unprotected, to the First Circuit's rule which balances the disruption caused by the reckless, false statements against the employer's interest in maintaining a reasonable workplace, to the Ninth Circuit's new rule, under which a showing of "mere disruption" to the workplace is inadequate, requiring the employer to "show actual injury to its *legitimate* interests" (App A-19, emphasis in original).

Given this conflict among the circuits, and the virtual certainty that future cases will arise involving recklessly false allegations by public employees, this case merits review by the Court.

2. If recklessly false statements are not per se unprotected by the First Amendment, how much disruption to operations must a public employer tolerate before limiting false or disparaging speech?

It is undisputed that Johnson's unfounded charges against McKinley obliterated their close working relationship, required for her job, and that her statements to coworkers and vendors undermined McKinley's relationship with subordinates and other persons with whom he did Expo business. Johnson's job had been to assist McKinley in managing Expo and to run the Fair under his authority. But it is undisputed that once McKinley learned of Johnson's recklessly false accusations, this was no longer possible.

In *Waters v. Churchill*, 511 U.S.___, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994), the Court stated:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

114 S. Ct. at 1887-1888. *Waters* established the Court's deference to government employers' reasonable predictions of disruption, when used to justify restrictions on employee speech. The Court stated:

> . . . [W]e have consistently given greater deference to government predictions of harm used to

> justify restriction of employee speech than on the predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.

114 S. Ct. at 1887. *Waters* established that employee complaints which threaten to undermine management's authority, and which create doubts about the employee's future effectiveness, constitute enough potential disruption to outweigh whatever First Amendment value the speech might have had, as a matter of law. 114 S. Ct. at 1890-1891. Both parties in this action discussed *Waters* in oral argument before the Ninth Circuit, but its opinion ignores *Waters* completely.

Pickering left unanswered the question, how much workplace disruption must a government employer tolerate before limiting its employees' unfounded verbal attacks? *Waters* substantially answered this question. But the Ninth Circuit's decision is contrary to the *Waters* standard for disruption. The Ninth Circuit acknowledged that Johnson's baseless allegations caused actual disruption in the workplace, destroyed the close working relationship between Johnson and McKinley, and undermined McKinley's relationships with his subordinates and private vendors. App. A-19. However, the Ninth Circuit still found that "the County must do more than show mere disruption." It created a new standard, requiring it to "show injury to its *legitimate* interests." The Ninth Circuit, without explanation, excludes workplace disruption as a legitimate interest.

The issue of recklessly false statements was not addressed in *Waters*. Since *Pickering* did involve false statements, the Ninth Circuit appears to have relied on *Pickering*'s footnote 6, pertaining to circumstances where no harmful effects could be shown. However, the Ninth Circuit's requirement that the County "must show actual injury" is unexplained (except that the Ninth Circuit implies that it must go beyond a showing of "mere disruption"). The Ninth Circuit standard fails to define "actual injury," and fails to consider the Court's determination in *Waters* that potential disruption constitutes actual harm, when used to justify restrictions on employee speech.

The new level of harm required by the Ninth Circuit contrasts starkly with the standard set by this Court in *Waters*. The Ninth Circuit's new standard will undermine *Waters*, and create confusion.[4] Given these conflicts and the potential for confusion caused by this decision, this case merits review by the Court.

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[4] The First Circuit's definition of "actual harm" for determining the point where it overcomes an employee's free speech right includes: impeding harmony among co-workers or the ability of supervisors to maintain discipline; detrimental impact on personal loyalty and confidence for the fulfillment of his job responsibilities; and, impeding the employee's performance of his daily duties or the regular operation of the government unit generally. *Brasslett v. Cota, supra*, 761 F.2d at 844. The Ninth Circuit's requirement of "actual injury to [the employer's] *legitimate* interests" evidently demands more than this, but how much more is unknown. Moreover, it did not discuss what "actual injury" is, or how it is distinct from the standard set out in the cases it relies upon, including *Brasslett*.

3. The decision of the Court of Appeals is erroneous.

Pickering's footnote 6 left open the question whether false statements recklessly made are per se unprotected by the First Amendment. *Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), decided after *Pickering*, appears to answer the question in the negative. Under *Arnett*, the Ninth Circuit's holding that recklessly false statements are protected is therefore erroneous.

In *Arnett*, the Court applied the *Connick/Pickering* public concern analysis to the termination of a nonprobationary federal employee under the Lloyd-LaFollette Act, 5 U.S.C.S. § 7501, for publicly stating that his supervisor and his assistant had attempted to bribe a third party. The employer contended these statements were made without any proof and in reckless disregard of the actual facts known to, or reasonably discoverable by, the discharged employee. The Court upheld the discharge. Citing *Pickering*, the Court concluded, among other things, that the type of speech involved – false statements knowingly or recklessly made – was not constitutionally protected and was therefore the type of speech which could subject an employee to termination for cause.

Arnett thus answered the question *Pickering* posed, but obliquely. The Circuits' failure to adopt and follow *Arnett*'s determination that recklessly false speech is not constitutionally protected most likely stems from the fact that the main issue was the due process rights of federal employees under the Lloyd-LaFollette Act. Nevertheless, the Ninth Circuit's failure to follow *Arnett* was erroneous. The Court should grant this petition to clarify footnote 6 in *Pickering*, in light of *Arnett*, and make it clear what

constitutional protection, if any, should be accorded recklessly false speech on matters of public concern.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN JOHNSON, *Plaintiff-Appellant,* v. MULTNOMAH COUNTY, OREGON a political subdivision of State of Oregon; WILLIAM MCKINLEY; PAUL YARBOROUGH, *Defendants-Appellees.*	No. 93-35353 D.C. No. CV-91-1189-DCA OPINION

Appeal from the United States District Court
for the District of Oregon
Donald C. Ashmanskas, Magistrate Judge, Presiding

Argued and Submitted
September 13, 1994 – Portland, Oregon

Filed February 16, 1995

Before: William A. Norris, David R. Thompson,
and Ruggero J. Aldisert,* Circuit Judges.

Opinion by Judge Norris

*Honorable Ruggero J. Aldisert, United States Circuit Judge, Third Circuit, sitting by designation.

SUMMARY

Individual Rights/Freedom of Speech/ Labor and Employment

The court of appeals vacated a district court judgment and remanded. The court held that the district court erred in granting summary judgment against a former public employee in her action against her former employer alleging she was fired because of statements she made about her supervisor.

Appellant Jan Johnson was employed by appellee Multnomah County, Oregon. Her job was to assist the manager of the county Expo Center and assist in the planning and supervision of the annual county fair. When her immediate supervisor left his position, Johnson applied for his job. Johnson was not chosen for the position. The County hired appellee William McKinley.

Johnson began making statements to co-workers and others accusing McKinley of mismanagement and possible criminal conduct. Johnson stated that McKinley was part of a "good old boy network" and got his position as a result of undue influence. She further stated that McKinley was awarding county contracts as paybacks for favors made by the "good old boy network." She also stated that McKinley was involved in "restraint of trade" with a fair vendor, was allowing his friends to use the Expo for free, and was not turning over to the County the proceeds of certain sales at the Expo. McKinley became aware of the comments. Johnson was fired.

Johnson brought a civil rights action against the County and McKinley. She claimed that she was fired because of the statements she made, and that the statements were protected by the First Amendment. The district court ruled that Johnson's speech was not protected. The court held that none of Johnson's statements involved a matter of public concern. The court entered summary judgment against Johnson. She appealed.

[1] There is a significant First Amendment interest in encouraging public employees, who have special access to facts relevant to debates on issues of public concern, to speak freely and to make that information available. There is a real danger that stripping all First amendment protection from recklessly false statements may inhibit the flow of accurate information from public employees who are uncertain about whether they have accumulated a legally sufficient factual basis for their statements. [2] Accordingly, recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.

[3] Johnson's allegations ranged from simple mismanagement, to misuse of public resources, to potentially criminal behavior. [4] Johnson's allegations did not constitute an "employee grievance." [5] Given the inherent public interest in the subject matter of Johnson's allegations and the state of the record, the district court erred in granting summary judgment to the County on the ground that Johnson's statements were not of public concern.

[6] There was a genuine issue of material fact in this case as to whether Johnson's allegations were recklessly false. [7] The record showed a dispute over whether influence was in fact exerted, and Johnson showed that her allegations were not baseless. [8] Furthermore, Johnson set forth the basis of her allegations that McKinley was awarding contracts to other "good old boys."

[9] The County's showing of disruption in the workplace caused by Johnson's statements was insufficient to entitle it to summary judgment on the ground that its legitimate administrative interests outweighed the First Amendment interest in Johnson's freedom of speech.

COUNSEL

Thad M. Guyer, Medford, Oregon, for the plaintiff-appellant.

Steven J. Nemirow, Deputy County Counsel, Portland, Oregon, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

Jan Johnson appeals an adverse summary judgment on her claim for violation of her First Amendment right to free speech. Johnson claims that she was fired from her county job because of statements she made about her supervisor, statements she claims were protected by the First Amendment. The district court ruled that her speech was not protected, entered summary judgment against

her § 1983 claim and dismissed her pendent state law claims without prejudice. We review the summary judgment de novo. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

I

Johnson was employed by Multnomah County as an administrative assistant in the Department of Environmental Services.[1] Her job was to assist the manager of the county Expo Center and assist in the planning and supervision of the annual county fair. When her immediate supervisor left his position, Johnson applied for his job, but was not chosen to succeed him. Johnson believed herself to be better qualified than William McKinley, the man the County hired. Soon after McKinley was hired, Johnson began making statements to co-workers and others accusing McKinley of mismanagement and possible criminal conduct.[2] According to the uncontroverted

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[1] Johnson does not dispute the magistrate's findings of uncontroverted facts. E.R. 225-28. The district court summarily adopted the findings and recommendations of the magistrate assigned to the case. E.R. 235.

[2] The record also shows that Johnson made critical remarks about McKinley that did not amount to such serious charges. However, the record indicates that Johnson was fired not solely for these lesser criticisms, but that the main concern was about the accusations of mismanagement and potential criminal conduct. *See* E.R. 46, 49-52. If a court finds that a protected statement was a substantial or motivating factor in the dismissal, the burden shifts to the employer to show that it would have fired the plaintiff in the absence of the protected statements. *Allen v. Scribner*, 812 F.2d 426, 433 (9th Cir. 1987). Since the County has not attempted such a showing, it cannot prevail at summary

facts, Johnson made the following statements about McKinley:

1. He was part of a "good old boy network" and got his position as a result of undue influence.

2. He was awarding county contracts as paybacks for favors made by the "good old boy network."

3. He was involved in "restraint of trade" with a fair vendor.

4. He was allowing his friends to use the Expo for free.

5. He was not turning over to the County the proceeds from t-shirt sales at a Latoya Jackson concert at the Expo.

After McKinley became aware of these comments, Johnson was eventually fired.

II

In order to prevail in her First Amendment claim, Johnson must initially prove that her statements were constitutionally protected. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). Johnson's speech cannot be protected unless it "substantially involved matters of public concern." *McKinley v. City of Eloy*, 705 F.2d 1110,

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judgment unless the First Amendment protects none of the statements that were a substantial or motivating factor in Johnson's dismissal. Therefore, the summary judgment can only be affirmed in this case if we determine that the undisputed facts show that the First Amendment protects none of Johnson's more serious allegations.

1114 (9th Cir. 1983); *accord Connick v. Myers*, 461 U.S. 138, 146 (1983). If she is able to show that the statements were of public concern, then the burden shifts to the County to show that its legitimate administrative interests outweigh the First Amendment interest in Johnson's freedom of speech. *See Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2337 (1993). In this case, the district court did not reach the *Pickering* balancing test, but instead granted the County summary judgment after holding that none of Johnson's statements involved a matter of public concern.

Speech involves a matter of public concern when it can fairly be considered to relate to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

The County argues that Johnson's statements were not upon matters of public concern because they were false and made with a reckless disregard for the truth.[3] The County argues that recklessly false statements, like statements about matters of no public interest, are per se unprotected by the First Amendment and that the Government need show no injury to its interests before it may fire an employee for making such statements.

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[3] The County does not contend that Johnson's statements were knowingly false. Therefore, we do not decide what, if any, protections such statements are afforded by the First Amendment.

In support of its position, the County relies solely upon *Pickering v. Bd. of Education*, 391 U.S. at 563. In *Pickering*, a school board urged the Supreme Court to hold that a teacher's statements were not constitutionally protected unless he spoke "factually and accurately, commensurate with his education and experience." 391 U.S. at 568-69. The teacher, on the other hand, urged the Court to rule that employees' statements on matters of public concern were protected unless they were made with knowledge that they were false or with a reckless disregard for the truth. *Id.* at 689. The Supreme Court expressly declined to "lay down a general standard against which all such statements may be judged." *Id.* Instead, the Court considered the statements' actual interference with the school board's legitimate interests in the operation of the school and weighed those interests against the important counter-interest in permitting free and open discussion of issues of public concern. The Court concluded, saying

> [i]n sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

391 U.S. at 574 (footnote omitted). The County argues that this passage means that recklessly false statements are per se unprotected. However, the County's argument is refuted by a footnote attached to this very passage, in

which the Court expressly declined to decide what protection was due recklessly false statements. *Id.* at n.6.[4]

In *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), our court considered a similar situation in which a public employee was alleged to have written libelous articles in the press. Following *Pickering*, we stated that such speech

> might be beyond First Amendment protection if the particular expression inhibits the efficient discharge of the employee's duties, or if the employee's position lends substantially greater credence to the expression than would be accorded to that of a member of the general public.

Id. at 742. Thus, we implied that the public employer must show a countervailing interest before it may terminate an employee for making statements that were recklessly false.

However, both *Pickering* and *Donovan* were decided prior to the Supreme Court's decision in *Connick*. Prior to *Connick*, determining whether speech was protected involved a single balancing test between the First Amendment interest in uninhibited speech and the public employer's interest in administrative efficiency. The *Pickering* balancing test did not attempt to first consider whether the speech was per se unprotected as a matter void of public concern. Thus, the public employer was always required to show at least some interference with its interests before it could penalize employees for their

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[4] In its brief, the County omits this footnote from its quotation of the case and fails to note its omission. Appellees' Brief at 10.

speech. The "matter of public concern" test attempts to identify those cases in which the First Amendment protection of the speech is so insubstantial that the employer need show no countervailing interest at all before the employer may repress it. The County argues that recklessly false statements, like speech regarding the minutiae of internal personnel disputes, enjoy so little First Amendment protection that the public employer need show no injury to its legitimate interest before taking adverse actions in retaliation.

The Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are per se unprotected or whether the recklessness should be considered as one of the factors in the *Pickering* balance of interests. In *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994), the Seventh Circuit stated that "even if the speech . . . involved a matter of public concern, an employee's speech is not protected where it is made with a reckless disregard for the truth. . . . " In *Wulf v. City of Wichita*, 883 F.2d 842, 859 n.24 (10th Cir. 1989), the Tenth Circuit wrote, "[p]resumably, the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under *Pickering*. It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern." *See also Powell v. Gallentine*, 992 F.2d 1088, 1091 (10th Cir. 1993). On the other hand, in *Brasslett v. Cota*, 761 F.2d 827, 840-41 (1st Cir. 1985), the First Circuit considered the recklessness of the employee's statements as part of the *Pickering* balancing test and refused to apply a per se rule. This same approach was followed by the D.C. and Fifth Circuits in

American Postal Workers Union v. United States Postal Service, 830 F.2d 294, 305-06 (D.C. Cir. 1987), and *Moore v. City of Kilgore*, 877 F.2d 364, 376 (5th Cir.), *cert. denied*, 110 S.Ct. 562 (1989), respectively.

We find the latter cases more persuasive. The County is correct that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). However, while false statements are not deserving, in themselves, of constitutional protection, "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). For this reason, constitutional protection is afforded some false statements. In determining the level of protection to such statements, the Supreme Court has traditionally balanced the interest in creating a "breathing space" for speech against the competing governmental interests associated with preventing injurious false statements. Thus, in deciding what latitude a state has in creating causes of action for defamation, the Supreme Court has weighed the legitimate state interest in compensating victims of defamatory falsehoods against the First Amendment interest in promoting vigorous public debate. *Gertz*, 418 U.S. at 341-42.

[1] This approach is consistent with considering recklessness as part of the *Pickering* balancing test. There is a significant First Amendment interest in encouraging

public employees, who have special access to facts relevant to debates on issues of public concern, to speak freely and make that information available. *See Pickering*, 391 U.S. at 571-72. There is a real danger that stripping all First Amendment protection from recklessly false statements may inhibit the flow of accurate information from public employees who are uncertain about whether they have accumulated a legally sufficient factual basis for their statements. A more cautious approach is in order, an approach that considers the actual damage done to the government by the reckless statement, whether anyone believed the statements, whether the government could easily rebut the false statements, etc. This is precisely the analysis undertaken in the *Pickering* balancing. *See Pickering*, 391 U.S. at 570-72.

Finally, although it was decided before *Connick*, *Pickering* itself provides authority for declining to adopt a per se rule. In *Pickering*, the Supreme Court explicitly declined to create a general duty of care with which public employees must speak in order to qualify for any First Amendment protection. While the Court left open that recklessly false statements would be treated differently, we see no reason why they should be. In the context of defamation law, the Supreme Court has permitted liability premised on recklessly false statements only in light of the countervailing governmental interest in compensating citizens who have suffered damages from such false statements. *Gertz*, 418 U.S. at 341-42. A public employer should have to show a similar countervailing interest in order to take adverse action against an employee for making reckless statements on matters of public concern.

[2] We conclude, therefore, that recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.

III

We return, therefore, to the question whether Johnson's statement substantially involved matters of public concern.

[3] "[C]ontent is the greatest single factor in the *Connick* inquiry." *See Havekost v. United States Dep't of Navy,* 925 F.2d 316, 318 (9th Cir. 1991) (quoting *Berg v. Hunter,* 854 F.2d 238, 243 (7th Cir. 1988) (citations omitted), *cert. denied* 489 U.S. 1053 (1989)). Johnson's allegations range from simple mismanagement, to misuse of public resources, to potentially criminal behavior. The guarantees of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *McKinley,* 705 F.2d at 1114 (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575 (1980) (plurality opinion)). Therefore, we have stated that misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern. *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1405 (9th Cir. 1988). Johnson's statements were of precisely this type.

The magistrate acknowledged that the content of Johnson's statements were of public concern, but nevertheless concluded that "[t]he evidence shows that Plaintiff's speech related solely to personnel disputes and grievances and did not benefit the public, consequently, Plaintiff's speech does not warrant First Amendment protection." E.R. 233. This conclusion is based upon a misunderstanding of the case law.

[4] In *Connick v. Myers*, the Court stated that the First Amendment "does not require a grant of immunity for *employee grievances* not afforded by the First Amendment to those who do not work for the State." 461 U.S. at 147 (emphasis added). However, Johnson's allegations did not constitute an "employee grievance" within the meaning of *Connick*. Although Johnson was embittered about not having been promoted, her allegations did not concern the "minutiae of workplace grievances," *Havekost*, 925 F.2d at 319, but rather concerned information that is of inherent "relevance to the public's evaluation of the performance of government agencies." *McKinley*, 705 F.2d at 1114. This case is not like *Connick*, which involved an employment dispute related to internal administrative procedures within a prosecutor's office. 461 U.S. at 140-41. Rather, it is similar to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 412-13 (1979), in which a teacher had been fired after complaining to her school's principal about school policies and practices which she perceived as racially discriminatory. That the statements were made by an employee about the operation of the government entity does not convert her speech into an unprotected "employee grievance."

Nonetheless, the County argues that other aspects of the context of Johnson's statements support the district court's conclusion that Johnson's statements were not of public concern. The County argues that we should take into account that Johnson was motivated by a private grudge against her boss and did not speak to protect the public or bring wrongdoing to light. The County is correct that the employee's motivation and the chosen audience are among the many factors to be considered in light of the public's interest in the subject matter of the speech. *See Havekosts* [sic], 925 F.2d 316, 318 (9th Cir. 1991) (stating that while the intended audience and purpose for speaking are relevant, "motive should not be used as a litmus test for public concern"); *Hyland v. Wonder*, 972 F.2d at 1139 (stating that speech need not be directed to general public to be of public concern). In a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest or to co-workers rather than to the press may lead the court to conclude that the statement does not substantially involve a matter of public concern.

[5] However, application of these principals in this case leads us to conclude that the County was not entitled to summary judgment based on a holding that Johnson's statements were not of public concern. Many of the relevant facts are in dispute. The County argues that Johnson spoke maliciously, with the intention of undermining of supervisor whose job she wanted. Johnson, on the other hand, presents evidence to show that she was motivated by a genuine interest in the welfare of the Expo and a

righteous indignation of McKinley's inadequate job performance. E.R. at 200-201. Given the inherent public interest in the subject matter of Johnson's allegations and the state of the record, we hold that the district court erred in granting summary judgment to the County on the ground that Johnson's statements were not of public concern.

IV

Even if Johnson spoke on matters of public concern, the County may yet be entitled to summary judgment "if the defendants show that [the] speech so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighs [the employee's] First Amendment rights." *Hyland v. Wonder*, 972 F.2d at 1139. The employer bears the burden of proving that the balance of interests weighs in its favor. *Id.* "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.*

[6] The County argues strenuously that its interests outweigh Johnson's because her statements were recklessly false and such statements receive very little protection from the First Amendment. While there is a First Amendment interest in protecting recklessly false statements out of a concern for creating a "breathing space" for robust public debate, that interest is certainly very limited.[5] *See Arnett v. Kennedy*, 416 U.S. 134, 162-63 (1974)

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[5] The First Amendment interest in protecting merely inaccurate statements made in good faith, however, is a good deal

(stating that the Court had no difficulty in concluding that the *Pickering* balancing test weighed in favor of the government in a case in which an employee made recklessly false allegations of bribe-taking by his superiors). However, there is a genuine issue of material fact in this case as to whether Johnson's allegations were recklessly false.

[7] In her deposition, Johnson stated that her belief that McKinley got his job through the "good old boy" network was founded upon the fact that McKinley was friends with Paul Ail, a concessionaire who held sway over one of the members of the County's hiring committee. E.R. at 70-73. That influence was due, Johnson testified, to Ail's personal relationship with the hiring committee member and because that member was an employee of a County Commissioner to whom Ail made campaign contributions. *Id.* The County argues that these facts are not evidence of actual influence and in her deposition Johnson agreed that she had no "evidence" of actual influence. E.R. at 72, 76. However, whether or not Johnson would characterize the basis of her inference of influence as "evidence" or a "feeling" is immaterial. The record shows a dispute over whether influence was in fact exerted and Johnson has shown that her allegations were not baseless.

[8] Furthermore, contrary to the County's assertions, Johnson did set forth the basis of her allegations that McKinley was awarding contracts to other "good old

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stronger. *See Pickering*, 391 U.S. at 571-73; *New York Times Co. v. Sullivan*, 376 U.S. at 271-72.

boys." Johnson presented evidence that some of the contractors had preexisting relationships with McKinley before he took the job and were then awarded contracts. This included Paul Ail who had connections to the hiring committee that chose McKinley for his job, and Glen Boss, who knew McKinley and Paul Ail. E.R. at 174. She testified that even though concession contracts at the Expo were supposed to be competitive, Boss kept receiving the contract. She attributed this to the fact that the Expo chose not to own the concession equipment, which meant that any new concessionaire would have to bear the cost of installing new equipment while incumbent Boss did not. E.R. at 175. Finally, Johnson testified that Paul Ail's son, Ron, had been given a contract which appeared unnecessarily lucrative. E.R. at 176.

Although Johnson testified that she did not know the legal basis of her claim that McKinley was restraining trade by placing certain restrictions on what vendors could sell, it does not appear that Johnson was attempting to make a legal claim, but rather was stating that the practice was unfair. *See* E.R. 104-105. Furthermore, Johnson testified as to the factual basis of her claim. She testified that McKinley was limiting the types of products some vendors could sell in order to reduce competition with the Expo's concessionaires because the Expo got a commission on items sold by concessionaires. *Id.*

Finally, the County does not controvert that McKinley was allowing people to use the Expo for free, but rather argues that this was authorized and proper. E.R. at 21:12. Furthermore, it does not dispute that no money was turned in from t-shirt sales at the Jackson concert. Instead, it claims that no t-shirts were sold. E.R.

at 27:10. However, Johnson testified that she saw t-shirts being sold at the concert. *See* E.R. at 179.

On the state of the record, therefore, we cannot find as a matter of law that Johnson's allegations were false or reckless. Therefore, for purposes of summary judgment, we must presume that her statements were true and made in good faith.

[9] The County next argues that even if Johnson's statements were of public concern and Johnson possessed proof of wrongdoing, her speech interest would still be outweighed by the County's interest in avoiding disruption in the workplace. The County's showing of disruption consists in evidence that Johnson's statements interfered with the close working relationship between herself and McKinley and undermined McKinley's relationship with co-workers, subordinates and private vendors. But the County must do more than show mere disruption. Instead, it must show actual injury to its *legitimate* interest. As the Third Circuit has recognized:

> [t]he First Amendment balancing test [of *Pickering*] can hardly be controlled by a finding that disruption did occur. An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.

O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3d Cir. 1989) (citations omitted) (emphasis omitted). In other words, the County does not have a legitimate interest in covering

up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure. Nor are the County's legitimate interests injured if McKinley was undermined by truthful statements exposing his own wrongdoing. If we were to hold otherwise, "[s]ome of the most important public employee speech – exposing government corruption, wrongdoing, or incompetence – would be left outside the First Amendment's aegis." *Hyland v. Wonder*, 972 F.2d at 1138. Because we presume for the purposes of summary judgment that Johnson's allegations were true, we hold that the County's showing of disruption is insufficient to entitle it to summary judgment on the ground that its legitimate administrative interests outweigh the First Amendment interest in Johnson's freedom of speech.

Therefore, the summary judgment in favor of the County is VACATED and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAN JOHNSON, Plaintiff, v. MULTNOMAH COUNTY, OREGON, a political subdivision of State of Oregon, WILLIAM McKINLEY, and PAUL YARBOROUGH, Defendants.	Civil No. 91-1189-AS FINDINGS AND RECOMMENDATION (Filed Nov. 24, 1992)

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ASHMANSKAS, Magistrate Judge:

Defendants, Multnomah County, William McKinley and Paul Yarborough ("Defendants") move for partial

summary judgment on the first, second and third causes of action asserted by plaintiff, Jan Johnson, ("Plaintiff") in her complaint ("Complaint"). Plaintiff alleges, in her First Claim for Relief, that Defendants deprived her of her First Amendment right of free speech[1]. In her remaining three claims, Plaintiff alleges unlawful employment practices, wrongful discharge and a wage claim[2].

Background

Plaintiff was employed by Multnomah County (the "County") as an Administrative Assistant in the Department of Environmental Services. (Complaint at 3, Para. 8). Plaintiff's duties were to assist the manager of the Expo Center ("Center") in managing the Center as well as planning, organizing and supervising the annual Multnomah County Fair ("Fair"). (Johnson Depo., Exh. 7). At the time Plaintiff was hired, Sam Phillip ("Phillip") was the manager of the Expo. (Johnson Depo. at 43). Within a year, Phillip retired and the County hired William McKinley ("Manager") as the new manager. (*Id.* at 65). Plaintiff, who had applied for the manager position, felt that she was better qualified than McKinley for the position and resented McKinley for getting the job. (*Id.* at 66, 188).

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[1] Plaintiff's First Claim for Relief is her only federal claim and is her basis for federal jurisdiction under 28 U.S.C.S. §1331.

[2] Plaintiff's Second, Third and Fourth Claims for Relief are pendent state claims which rely on the First Claim for Relief to establish federal jurisdiction under 28 U.S.C.A. §1367.

Almost immediately after McKinley was hired, Plaintiff began making statements to co-workers and Fair vendors that McKinley was part of a "good old boy network" and that he got the manager position as a result of undue influence and promises of payback in the future. (*Id.* at 50, 130, 136-68). Plaintiff also complained to co-workers that McKinley's salary had been elevated above that generally paid to the Expo manager (*Id.* at 202-5), that Mckinley [sic] used a county car to commute to work (*Id.* at 77), that McKinley had taken home a lap-top computer which had been purchased by the County primarily for Plaintiff's use (*Id.* at 209-10), that McKinley was rarely present at the Expo when needed (*Id.* at 112), that McKinley watched television in his office in the morning (*Id.* at 187) and that McKinley took naps in his office during the day (*Id.* at 186). Finally, Plaintiff implied to co-workers and Fair vendors that McKinley was awarding county contracts as payback for favors made by the "good old boy network" (*Id.* at 116), that McKinley was involved in "restraint of trade" with a Fair vendor (*Id.* at 119), that McKinley was allowing his friends to use the Expo free of charge (*Id.* at 142) and that McKinley was not turning over to the County all the money it was entitled to on sales of memorabilia by the artists performing at the Fair (*Id.* at 113, 138).

In mid-July, McKinley became aware of Plaintiff's activities and requested that something be done. (McKinley Aff. at 2). On July 29, 1991, Paul Yarborough informed Plaintiff that her employment with the County had been terminated. (Complaint at 5, Para. 11). Plaintiff was given involuntary leave with pay until September,

25, 1991, when she was classified as involuntarily suspended without pay. (Complaint at 6, Paras. 12, 13). Plaintiff was finally dismissed from employment on October 10, 1991. (Complaint at 6, Para. 13).

Plaintiff was advised of her right to appeal her termination to the Merit Systems Council by Paul Yarborough and her neighbor, Helen Fleming, whose husband was a state employee. (Johnson Depo. at 140, 249-50). Plaintiff decided not to pursue this appeal because she "just felt it would be a waste of [her] time." (Johnson Depo. at 141). This decision was made after Plaintiff had retained an attorney to counsel her with regard to this dispute. (Johnson Depo. at 250).

Plaintiff filed the Complaint on November 13, 1991. Defendants filed their Answer asserting, among other affirmative defenses, that Plaintiff failed to exhaust her administrative remedies. (Answer at 2, Para. 7). Defendants then filed their motion for partial summary judgment presently before the Court arguing that Plaintiff's federal and state "whistleblower" actions failed because her speech was not of public concern and was published primarily for personal reasons and that Plaintiff's wrongful discharge claim fails because of existing adequate statutory remedies. The Court requested that both Plaintiff and Defendants also brief the issue of exhaustion of administrative remedies based on Plaintiff's failure to appeal her termination to the Merit System Council.

Legal Standard

Summary judgment is proper "if the pleading, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the nonmoving party bears the burden of proof as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987). The nonmoving party must come forward with specific facts from which a reasonable jury could find in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *United Steelworkers of America v. Phelps Dodge Corp.*, 833 F.2d 804 (9th Cir. 1987).

Particular rules of construction apply to summary judgment motions. First, all reasonable doubts as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Second, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Finally, when different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

Discussion

Exhaustion of State Remedies

As requested by the Court, the parties filed supplemental briefs addressing the issue of exhaustion of

administrative remedies. Defendants argue that "[s]trong policy arguments, including the thorough procedural protections for [P]laintiff's due process rights, efficiency in government workplaces and in the courts, and the unsettled state of case law in the area of exhaustion of administrative remedies allow this [C]ourt to dismiss [P]laintiff's claims for failure to exhaust the administrative remedies that were available to her through Multnomah County's Merit System Council." (Deft. Supp. Brief at 1). The Court agrees with Defendants' argument with the exception of their statement that the case law in the area of administrative exhaustion in actions under 42 U.S.C.A. §1983 is unsettled. In *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1981), the United States Supreme Court held that "[b]ased on the legislative histories of both §1983 and §1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983. The Court should not require Plaintiff to exhaust her administrative remedies as a prerequisite to her §1983 action.

Motion for Partial Summary Judgment

In reviewing a public employee's First Amendment claims, the courts will invoke a three-step process: (1) is the employee's speech constitutionally protected; (2) if so, was the speech a "substantial" or "motivating" factor in her employer's action against her; and (3) have defendants shown that the same action would have been taken in the absence of the protected activity. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989).

A two-step analysis determines whether federal courts will protect the speech at issue. The threshold question is whether it addresses matters of "public concern." *Wheaton v. Webb-Petett*, 931 F.2d 613, 618 (9th Cir. 1991). If it does, the court must balance the employee's interest in making her statement against the interest of the government, as an employer, in promoting efficient delivery of public services. *Gillette*, 886 F.2d at 1197. The latter inquiry focuses on the effective functioning of the public employer's enterprise.

Defendants argue that the speech at issue was not of public concern. Defendants assert that Plaintiff "was a resentful disappointed employee who coveted her supervisor's job, and viciously attacked his integrity without any effort to establish her facts. Moreover, even though she had ample opportunity, [P]laintiff never brought her accusations of McKinley's 'fraud, waste and mismanagement' to the attention of any government official, newspaper, or even to her department head, Paul Yarborough, whom she admits she has no reason to distrust." (Deft. Memo. in Supp. at 19). Defendants argue that the escalation of Plaintiff's attacks, from McKinley's involvement with the "good old boy network" to derogatory statements regarding McKinley's work ethic and management skills to accusations that McKinley participated in criminal acts involving payback for favors and skimming, is significant in establishing that Plaintiff was discussing personal employment matters rather than attempting to bring wrongdoing to light for the benefit of the public.

Speech that can be fairly considered as relating to any matter of political, social, or other concern to the community is constitutionally protected. *Gillette*, 886 F.2d

at 1197 (firefighter's critical comments regarding other officers' response to emergency call was comment on matter of concern). It need not be directed to the public at large, *Rankin v. McPherson,* 483 U.S. 378, 386, n. 11 (1987), but rather, is to be evaluated with reference to its "content, form, and context." *Allen v. Scribner,* 812 F.2d 426 (9th Cir. 1987). As the Ninth Circuit stated in *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir. 1983):

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and the information would be of no relevance to the public's evaluations of the performance of governmental agencies. On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

While the content of Plaintiff's speech could be viewed as an evaluation of the performance of a public official, the form of the speech as well as the context in which it was made support a finding that the speech was private and not entitled to constitutional protection. Plaintiff admits that she had no motive in making a number of the statements (Johnson Depo. at 130, 135) which undermines her argument that she intended to protect the public or bring wrongdoing to light by making the statements. Plaintiff indicated that she thought she had a good working relationship with the Board of County Commissioners (Johnson Depo. at 31) and yet she did not inform the Board or any of the Commissioners of

her concerns with regard to McKinley's job performance (Johnson Depo. at 77, 226). Finally, when given the opportunity to speak with county auditors on two separate occasions, Plaintiff did not express her concerns regarding McKinley's allowing personal friends to use the Center without charge or McKinley's withholding of funds due the County from the sale of artist's memorabilia. (Johnson Depo. at 166).

The evidence shows that Plaintiff's speech related solely to personnel disputes and grievances and did not benefit the public, consequently, Plaintiff's speech does not warrant First Amendment protection. Plaintiff [sic] First Claim for Relief should be DENIED.

The Court has recommended that summary judgment be granted on Plaintiff's only federal law claim. Consequently, Plaintiff's sole basis for federal jurisdiction has been eliminated. The Court has no continuing jurisdiction over Plaintiff's remaining claims, which are all state law claims and which were before this court on pendant and ancillary jurisdiction. Plaintiff's Second, Third and Fourth Claims for Relief should be dismissed, sua sponte, for lack of jurisdiction.

Conclusion

Defendants' motion (18) for summary judgment on Plaintiff's First Claim for Relief should be GRANTED. Plaintiff's Second, Third and Fourth Claims for Relief, which are all based on state law, should be dismissed, sua sponte, for lack of jurisdiction.

DATED this 23 day of November, 1992.

/s/ Donald C. Ashmanskas
Donald C. Ashmanskas
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAN JOHNSON, Plaintiff, v. MULTNOMAH COUNTY, OREGON, a political subdivision of State of Oregon, WILLIAM McKINLEY, and PAUL YARBOROUGH, Defendants.	)	CV 91-1189-AS ORDER

Magistrate Judge Donald C. Ashmanskas filed his Findings and Recommendation on November 24, 1992. The matter is now before me. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings *de novo* review. *Lorin Corp. v. Goto & Co., Ltd.*, 700 F.2d 1202, 1206 (9th Cir. 1982). *See also Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed the legal principles *de novo*, I find no error.

Accordingly, I ADOPT Magistrate Judge Ashmanskas's Findings and Recommendation that defendants' motion (18) for summary judgment on plaintiff's first claim for relief be granted. Plaintiff's second, third and fourth claims for relief, which are all based on state

law, should be dismissed, sua sponte, for lack of jurisdiction.

IT IS SO ORDERED.

DATED this 11 day of March, 1993.

/s/ Owen M. Panner
Owen M. Panner
United States District Judge